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No. 06-691

In the Supreme Court of the United States

UNITED STATES OF AMERICA
EX REL. MICHAEL G. NEW, PETITIONER

v.

ROBERT M. GATES, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's collateral challenge to his conviction by court-martial for failing to obey a lawful order issued by a member of the armed forces, in violation of Article 92(2) of the Uniform Code of Military Justice, 10 U.S.C. 892(2).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 448 F.3d 403. The opinion of the district court granting respondents' motion to dismiss (Pet. App. 15a-53a) is reported at 350 F. Supp. 2d 80.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2006. A petition for rehearing was denied on August 17, 2006 (Pet. App. 54a). The petition for a writ of certiorari was filed on November 15, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

At a special court-martial, petitioner was convicted of failing to obey a lawful order issued by a member of the armed forces, in violation of Article 92(2) of the Uniform Code of Military Justice, 10 U.S.C. 892(2). Petitioner was sentenced to a bad-conduct discharge. The Army Court of Criminal Appeals affirmed, 50 M.J. 729 (1999), and the Court of Appeals for the Armed Forces affirmed. Pet. App. 55a-131a. Petitioner then filed a civil action against respondents, the Secretary of Defense and the Secretary of the Army, in the United States District Court for the District of Columbia, challenging his conviction on various grounds. *Id.* at 170a-186a. The district court granted respondents' motion to dismiss for failure to state a claim. *Id.* at 15a-53a. The court of appeals affirmed. *Id.* at 1a-14a.

1. Petitioner was a medic in the United States Army. In 1992, the United Nations established a protective force in the Former Yugoslav Republic of Macedonia. In 1995, petitioner's unit was ordered to deploy to Macedonia as part of the United Nations protective force. In connection with the deployment, members of the unit were ordered to wear various items of United Nations insignia along with their ordinary Army uniforms. Petitioner expressed concerns to his supervisors about the lawfulness of the Army's participation in the mission generally and the lawfulness of the uniform-modification order more specifically. Petitioner's unit was ordered to begin wearing the modified uniform at a battalion formation on October 10, 1995. When petitioner appeared at the battalion formation, he was wearing a uniform without the required United Nations insignia. He was

removed from the formation and subsequently declared non-deployable. Pet. App. 1a-2a, 57a-59a.

2. On October 17, 1995, petitioner was charged before a special court-martial with failing to obey a lawful order issued by a member of the armed forces, in violation of Article 92(2) of the Uniform Code of Military Justice, 10 U.S.C. 892(2). Petitioner moved to dismiss the charge on the grounds, *inter alia*, (1) that the uniform-modification order was unlawful under Army Regulation 670-1, which governs Army uniforms and insignia, and Article I, Section 9, of the Constitution, which prohibits a federal officeholder from accepting an emolument from a foreign government without congressional consent, and (2) that the Army's participation in the peacekeeping mission, and thus the underlying deployment order, were also unlawful. The military judge denied petitioner's motions to dismiss, reasoning that the uniform-modification order was lawful and that petitioner's challenge to the underlying deployment order presented a nonjusticiable political question. After a trial, the court-martial panel found petitioner guilty, and petitioner was sentenced to a bad-conduct discharge. Pet. App. 2a-3a.

3. On appeal, petitioner renewed the arguments from his motions to dismiss and also argued that the military judge erred by deciding the lawfulness of the uniform-modification order, rather than submitting it to the court-martial panel. The Army Court of Criminal Appeals affirmed. 50 M.J. 729 (1999). It held that the military judge correctly concluded that the uniform-modification order was lawful, *id.* at 740; that the military judge correctly concluded that petitioner's challenge to the underlying deployment order presented a nonjusticiable political question, *id.* at 739-740; and that

the military judge properly decided the lawfulness of the uniform-modification order, on the ground that, "[w]hen disobedience of an order is charged, the legality of the order is normally a question of law to be determined by the military judge as an interlocutory matter." *Id.* at 738.

4. The Court of Appeals for the Armed Forces (CAAF) affirmed. Pet. App. 55a-131a.

a. As is relevant here, the CAAF first held that the military judge properly decided the lawfulness of the uniform-modification order, rather than submitting it to the court-martial panel. Pet. App. 63a-76a. The court reasoned that "lawfulness of an order * * * is not a discrete element of an offense under Article 92" but is instead "a question of law" that the military judge could validly decide. *Id.* at 64a. The court explained that "[i]nclusion of the word 'lawful' in Article 92 did not add a separate element to the offense of violating a regulation or order"; rather, it "simply reinforce[d] the opportunity for the accused to challenge the validity of the regulation or order." *Id.* at 73a. "Adjudicating the issue of lawfulness as a question of law for the military judge," the court continued, "ensures that the validity of the regulation or order will be resolved in a manner that provides for consistency of interpretation through appellate review." *Id.* at 74a.

The CAAF then held that the uniform-modification order was lawful. Pet. App. 76a-81a. The court reasoned that "[o]rders are clothed with an inference of lawfulness," *id.* at 77a, and determined that "the evidence presented by [petitioner] did not overcome the presumption of lawfulness." *Ibid.* The court explained that "it is difficult to think of a requirement more necessary to promoting the basic [peacekeeping] mission or to

safeguarding discipline and morale of deployed troops than uniform requirements." *Id.* at 80a.

Finally, the CAAF held that petitioner's challenge to the underlying deployment order presented a nonjusticiable political question. Pet. App. 81a-83a. The CAAF reasoned that "[c]ourts have consistently refused to consider the issue of the President's use of the Armed Forces." *Id.* at 82a.

b. Judge Effron concurred. Pet. App. 84a-94a. While he agreed that the military judge was not required to "submit the issue of legality to the [panel] members as an essential element of the offense," *id.* at 85a, he suggested that the Manual for Courts-Martial should "provide more detailed guidance as to the appropriate means by which the legality of an order should be raised and adjudicated in a court-martial." *Id.* at 88a.

c. Judge Sullivan concurred in the result. Pet. App. 94a-126a. He concluded that the military judge had erred by deciding the lawfulness of the uniform-modification order because the lawfulness of the order constituted "an element of the crime which is a mixed question of fact and law." *Id.* at 115a. He reasoned that this case was therefore analogous to *United States* v. *Gaudin*, 515 U.S. 506 (1995), in which the Court held that the materiality of a fact contained in a false statement should be submitted to the jury in a prosecution under 18 U.S.C. 1001. Pet. App. 115a-121a. Judge Sullivan concluded, however, that any error in failing to submit the lawfulness of the order to the court-martial panel was harmless because "it was uncontroverted in [petitioner's] case that he was ordered to wear the UN badges and cap pertinent to the official deployment of his unit to Macedonia as part of a peacekeeping mission"; "[i]t was also uncontroverted that the order to wear these badges was

given by his commanders as part of the operations plans for the mission and for safety purposes"; and petitioner "proffered no [contrary] evidence." *Id.* at 124a-125a.

d. Judge Everett concurred in part and concurred in the result. Pet. App. 126a-131a. He reasoned that the political question doctrine precluded petitioner's challenge to the lawfulness of the deployment order, *id.* at 129a, and that any question of fact relating to the lawfulness of the uniform-modification order was "so insubstantial that the judge's failure to instruct thereon was not reversible error." *Id.* at 131a.

5. This Court denied review of the CAAF's decision. 534 U.S. 955 (2001).

6. Petitioner filed a civil action against respondents in the United States District Court for the District of Columbia, which, as amended, challenged his conviction on various grounds. In that action, petitioner claimed that he was denied due process because (1) the military judge, rather than the court-martial panel, decided the lawfulness of the uniform-modification order; (2) the military judge held that the legality of the underlying deployment order presented a nonjusticiable political question; (3) the military courts should have more fully considered his claim that the uniform-modification order violated Article I, Section 9, of the United States Constitution; and (4) the military judge erred by determining that the items of United Nations insignia were justified under Army Regulation 670-1. Pet. App. 22a-23a, 170a-186a.

Treating the action as a petition for habeas corpus under 28 U.S.C. 2241, the district court granted respondents' motion to dismiss for failure to state a claim. Pet. App. 15a-53a. As a preliminary matter, the court reasoned that, while it could consider constitutional as well

as non-constitutional claims on collateral review of a military conviction, it would "afford substantial deference to the military courts in their application of military law." *Id.* at 31a.

On the merits of petitioner's claims, the district court first rejected petitioner's claim that the military judge erred by deciding the lawfulness of the uniform-modification order. Pet. App. 32a-34a. The court reasoned that, "[t]o the extent that a right to jury trial exists in this context, it is a creation of the Uniform Code of Military Justice, not the United States Constitution," *id.* at 33a (footnote omitted), and that petitioner's claim involved "rather specialized questions of military law on which the Court defers to the military courts." *Id.* at 34a. The court then rejected petitioner's challenge to the deployment order. *Id.* at 34a-50a. The court reasoned that each of petitioner's bases for challenging the order either implicated a nonjusticiable political question or lacked merit. *Id.* at 40a-50a. Finally, the court rejected petitioner's challenges to the uniform-modification order. *Id.* at 50a-52a. With regard to petitioner's claim under Article I, Section 9, of the Constitution, the court reasoned that the claim "was extensively litigated at trial" and "raised and rejected on appeal," *id.* at 51a; that "[p]etitioner has offered (and there appears to be) no Supreme Court precedent defining the scope and application of [Section 9]," *ibid.*; and that, "[i]n any event, in the judgment of this Court[,] the uniform order does not violate the plain language" of that provision. *Id.* at 52a n.16. With regard to petitioner's claim under Army Regulation 670-1, the court reasoned that "[p]etitioner in essence asks this Court to re-weigh the evidence presented to the trial judge," Pet. App. 51a; that "[t]he military judge found petitioner's fundamental

proffer insufficient to rebut the presumption of lawfulness that attaches to military orders," *ibid.*; and that "it is not for this Court to disturb that finding." *Ibid.*

7. The court of appeals affirmed. Pet. App. 1a-14a.

a. As a preliminary matter, the court of appeals determined that jurisdiction rested not on the habeas statute, 28 U.S.C. 2241, but on the general federal-question statute, 28 U.S.C. 1331, because petitioner was not in custody. Pet. App. 4a. The court explained that, in *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), this Court had suggested that, although there was federal jurisdiction over a collateral challenge to a military conviction even in the absence of custody, collateral review was available only to challenge "fundamental" defects that rendered the conviction "void." Pet. App. 4a. The court reasoned that this standard of review was "more deferential than habeas review of military judgments," which was itself at least as deferential as habeas review of state-court judgments. *Id.* at 5a. The court noted that, in *Burns* v. *Wilson*, 346 U.S. 137 (1953), a plurality of this Court had suggested that the relevant inquiry, in conducting habeas review of military judgments, was whether the military had given "fair consideration" to each of the habeas petitioner's claims. Pet. App. 5a. The court indicated that it was unclear whether, in light of the fact that state-court judgments are entitled to greater deference on habeas review now than they were at the time of *Burns*, military judgments should be entitled to greater deference as well. *Id.* at 6a-7a. The court added, however, that "we have serious doubt whether the judicial mind is really capable of applying the sort of fine gradations in deference that the varying formulae may indicate." *Id.* at 7a. "It suffices for our purposes," the court concluded, "to repeat *Councilman*'s

statement that errors must be fundamental to void a court-martial judgment on collateral review." *Ibid.*

b. The court of appeals proceeded to hold that, under a deferential standard of review, all of petitioner's claims lacked merit. Pet. App. 7a-14a.

The court of appeals first rejected petitioner's claim that the military judge erred by deciding the lawfulness of the uniform-modification order. Pet. App. 7a-9a. The court noted that petitioner could invoke only the Due Process Clause to support that claim, because the right to a jury trial under the Sixth Amendment is inapplicable in a court-martial. *Id.* at 7a. The court additionally noted that it was only "by virtue of a *statute*" that "any element of the offense must be submitted to the military jury for evaluation under the reasonable doubt standard." *Id.* at 8a (citing 10 U.S.C. 851(c)). Whatever the source of the right on which petitioner relied, the court reasoned that "[i]dentifying the elements of a statutory provision defining a crime is an exercise in statutory interpretation," *ibid.*, and concluded that there was "no fundamental defect in the [CAAF's] conclusion that the lawfulness of an order is not a separate and distinct element of the offense." *Ibid.*

The court of appeals next rejected petitioner's challenges to the uniform-modification order. Pet. App. 9a-11a. With regard to petitioner's claim under Army Regulation 670-1, the court reasoned that petitioner had "acknowledge[d] the presumption of lawfulness that attaches to military orders" but "did not proffer any evidence" to overcome that presumption. Pet. App. 10a. The court noted that Judge Sullivan, who had disagreed with the CAAF majority on whether the military judge could decide the lawfulness of the uniform-modification order, had concluded that any error was harmless be-

cause the commanders had "indisputably" issued the order for mission-related and safety purposes. *Ibid.* The court therefore concluded that it "c[ould] find no fundamental defect in the [CAAF's] consideration of the issue." *Id.* at 11a. With regard to petitioner's claim under Article I, Section 9, of the Constitution, the court noted that petitioner "offer[ed] no legal analysis" supporting his claim, and that the claim was "a stretch at best." Pet. App 11a. For that reason, the court concluded, the military judge did not err by disposing of that claim summarily. *Ibid.*

Finally, the court of appeals rejected petitioner's challenge to the deployment order. Pet. App. 11a-14a. The court stated that "the military courts' use of the political question doctrine deserves deference." *Id.* at 12a. The court reasoned that, regardless whether petitioner's claims would be barred by the political question doctrine in an ordinary civil suit, "the military justice context compels a somewhat broader doctrine in light of the implications of any alternative view." *Id.* at 13a. The court explained that a contrary holding would allow a soldier to invoke "a self-help remedy of disobedience" and to use a court-martial as "a vehicle for altering the traditional relationship between the armed forces and the civilian policy making branches of government." *Ibid.* (citation omitted). "Given the threat to military discipline," the court concluded, "we have no difficulty accepting the military courts' reliance on the [political question] doctrine." *Id.* at 14a.

ARGUMENT

Petitioner contends (Pet. 11-20) that the court of appeals applied an erroneous standard of review to claims raised in a collateral federal-court challenge to a convic-

tion by court-martial. Petitioner also contends (Pet. 20-30) that the military judge deprived him of due process by deciding the lawfulness of the uniform-modification order, rather than submitting that issue to the court-martial panel, and by holding that the lawfulness of the deployment order presented a nonjusticiable political question. None of those contentions warrants further review.

1. This Court's most relevant decision on the standard of review for claims raised in a collateral challenge to a conviction by court-martial is *Burns* v. *Wilson*, 346 U.S. 137 (1953). In *Burns*, this Court affirmed the dismissal of petitions for habeas corpus filed by two military prisoners convicted by courts-martial of murder and rape. In a plurality opinion, four members of the Court concluded that, on habeas review of military judgments, the appropriate inquiry was "whether the military have given fair consideration to each of [petitioner's] claims." *Id.* at 144. Because the military courts had "heard petitioners out on every significant allegation which they now urge," the plurality concluded that "[p]etitioners ha[d] failed to show that this military review was legally inadequate." *Id.* at 144, 146. By contrast, the plurality reasoned, a district court could review claims de novo where the underlying allegations were "sufficient to depict fundamental unfairness" and "the military courts [had] manifestly refused to consider those claims." *Id.* at 142. Justice Minton concurred in the judgment, reasoning that the sole function of a court conducting habeas review was "to see that the military court ha[d] jurisdiction, not whether it ha[d] committed error in the exercise of that jurisdiction." *Id.* at 147. Justice Jackson concurred in the result without opinion. *Id.* at 146.

As one court of appeals recently noted, since this Court's decision in *Burns*, "[t]he degree to which a federal habeas court may consider claims of errors committed in a military trial has * * * been the subject of controversy and remains unclear." *Brosius* v. *Warden, U.S. Penitentiary*, 278 F.3d 239, 242 (3d Cir.) (Alito, J.), cert. denied, 537 U.S. 947 (2002). Although the courts of appeals have articulated the standard of review for claims raised in a habeas petition in different ways, however, they have been in broad agreement on two principles. First, the courts of appeals have generally held that, where the claims at issue have already been considered by the military courts, only claims involving fundamental or substantial constitutional errors are cognizable on collateral review. See, *e.g.*, *Bowling* v. *United States*, 713 F.2d 1558, 1561 (Fed. Cir. 1983) (explaining that "the constitutional claims made must be serious ones" and "demonstrate convincingly that in the court-martial proceedings there has been such a deprivation of fundamental fairness as to impair due process"); *Calley* v. *Callaway*, 519 F.2d 184, 199 (5th Cir. 1975) (stating that "[t]he asserted error must be of substantial constitutional dimension"). Second, the courts of appeals have generally held that, even with regard to such constitutional claims, the decisions of the military courts are entitled to at least some degree of deference. See, *e.g.*, *Brosius*, 278 F.3d at 245 (stating that "our inquiry in a military habeas case may not go further than our inquiry in a state habeas case" and assuming, for the sake of argument, that the deferential standard of 28 U.S.C. 2254(d) was applicable to the substantive determinations of military courts); *Kauffman* v. *Secretary of the Air Force*, 415 F.2d 991, 997 (D.C. Cir. 1969) (explaining that "the test of fairness requires that military rulings

on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule").

Insofar as the courts of appeals have articulated different formulations of the standard of review for collateral challenges to convictions by courts-martial, this case would constitute a poor vehicle in which to address those inconsistencies, because it presents an additional complication: *viz.*, that, because petitioner is not in custody, jurisdiction rests not on the habeas statute, 28 U.S.C. 2241, but on the general federal-question statute, 28 U.S.C. 1331. See Pet. App. 4a. In this case, the court of appeals suggested that the standard of review in a collateral challenge under 28 U.S.C. 1331 was "more deferential" than the standard of review on habeas, Pet. App. 5a, though it ultimately concluded only that "errors must be fundamental to void a court-martial judgment on collateral review." *Id.* at 7a. As the court of appeals noted (*id.* at 5a), moreover, this Court's decision in *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), seemingly supports the proposition that the standard of review in collateral challenges under Section 1331 should be more deferential. See *id.* at 753 (noting that "grounds of impeachment cognizable in habeas proceedings may not be sufficient to warrant other forms of collateral relief"). Although petitioner and his amicus cite various cases (including *Kauffman*) in which lower courts have applied the same standard of review in collateral challenges under Section 1331 as on habeas, they do not identify any case (other than this one) that has even discussed, much less rejected, the argument that the standards should be different. To the extent that the Court wishes to clarify the standard of review for collateral challenges to convictions by courts-martial,

therefore, it should either do so in a case in which the defendant is proceeding under the habeas statute, or await further percolation on the applicable standard of review in a collateral challenge under Section 1331.

2. In any event, even assuming, *arguendo*, that the courts of appeals' differing formulations of the standard of review for collateral challenges to convictions by courts-martial would lead to different results in any given case, this case would constitute a poor vehicle for addressing the issue for the additional reason that, under any plausible formulation of the applicable standard, petitioner would not prevail on either of the underlying claims that he continues to advance.[1] All of the numerous courts to have considered those claims (or variations of them) have rejected them, and this Court denied certiorari on those claims on direct review. See Pet. at 14-19, 21-29, *New* v. *United States*, cert. denied, 534 U.S. 955 (2001) (No. 01-425).

a. Petitioner first contends (Pet. 22-27) that the court of appeals erred by rejecting his claim that the military judge violated his right to due process by failing to submit the lawfulness of the uniform-modification order to the court-martial panel, on the ground that the lawfulness of the order is an element of the underlying offense of failing to obey a lawful order issued by a member of the armed forces. See 10 U.S.C. 892(2). That claim lacks merit and does not independently warrant review.

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[1] Before this Court, petitioner has apparently abandoned his claims that he was denied due process because the military courts should have more fully considered his claim that the uniform-modification order violated Article I, Section 9, of the United States Constitution, and because the military judge erred by determining that the items of United Nations insignia were justified under Army Regulation 670-1.

The Due Process Clause requires that, in a criminal prosecution, the government "pro[ve] beyond a reasonable doubt * * * every fact necessary to constitute the crime with which [the defendant] is charged." *In re Winship*, 397 U.S. 358, 364 (1970). Even assuming that the lawfulness of the order is an element of the offense of failing to obey a lawful order issued by a member of the armed forces, petitioner does not support his assertion (Pet. 23-25) that the military judge failed to apply the reasonable-doubt standard in determining that the uniform-modification order was lawful. Indeed, he appears to have made "no real contest" on any factual issue relevant to the lawfulness of the order. See Pet. App. 125a.[2] Apart from the standard-of-proof question, to the extent that petitioner claims that the court-martial panel (which serves as the military equivalent of a civilian jury), and not the military judge, should have evaluated the lawfulness of the order, see *id.* at 181a (contending, in the relevant count of the complaint, that the CAAF erred by ruling that "lawfulness was not an element of the offense * * * and therefore[] not an issue for the military jury"), his claim is not of constitutional dimension.

As petitioner concedes (Pet. 8, 26), the Sixth Amendment does not confer the right to a jury in a court-martial proceeding. See, *e.g.*, *Ex parte Quirin*, 317 U.S. 1,

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[2] Although petitioner contends (Pet. 24) that "the CAAF majority imposed the burden of proving the unlawfulness of the order" upon him, the cited portion of the CAAF's opinion stands only for the proposition that a military order is presumed to be lawful. See Pet. App. 80a. Elsewhere in his petition, petitioner seemingly concedes the applicability of that presumption in courts-martial, at least as a general matter. See Pet. 27 (noting that, "[i]n a court-martial for disobedience of a lawful order, a military order is presumed to be lawful").

39 (1942). Accordingly, petitioner does not ground his claim on the Sixth Amendment, but instead seemingly grounds his claim on Article 51(c) of the Uniform Code of Military Justice, 10 U.S.C. 851(c), which provides that the military judge should submit all of the elements of the offense to the members of the court-martial panel. Petitioner cannot contend, however, that a violation of Article 51(c) involves the kind of fundamental unfairness that implicates the *Fifth Amendment* guarantee of due process—especially in light of the more limited role that the Due Process Clause plays in the military justice system. See, *e.g.*, *Weiss* v. *United States*, 510 U.S. 163, 176-178 (1994). Even assuming that the lawfulness of the order is an element of the offense that should have been submitted to the court-martial panel under Article 51(c), therefore, petitioner has failed to state a valid due process claim—and his non-constitutional claim, which petitioner advanced on direct review, would not be cognizable on collateral review. See, *e.g.*, *Bowling*, 713 F.2d at 1562; *Calley*, 519 F.2d at 199.

In any event, the military courts did not err by concluding that the lawfulness of the order did not constitute an element of the underlying offense of failing to obey a lawful order issued by a member of the armed forces. The better view is that, as the term suggests, the "lawfulness" of an order should be treated as a question of law that need not be submitted to the court-martial panel under Article 51(c), rather than as a mixed question of law and fact (like the materiality of a fact contained in a false statement in a prosecution under 18 U.S.C. 1001). See *United States* v. *Gaudin*, 515 U.S. 506, 511-515 (1995). As the CAAF noted, if a contrary rule were applied, "the validity of regulations and orders of critical import to the national security would be sub-

ject to unreviewable and potentially inconsistent treatment by different court-martial panels." Pet. App. 74a. Moreover, as Judge Sullivan concluded in his concurring opinion, even if the military judge had erred by failing to submit the lawfulness of the uniform-modification order to the court-martial panel (or by applying something less than the reasonable-doubt standard), any error was harmless, because petitioner made no factual showing relevant to the ultimate question whether the order was invalid under Army Regulation 670-1. See Pet. App. 124a-125a.

b. Petitioner next contends (Pet. 27-30) that the court of appeals erred by rejecting his claim that the military judge violated his right to due process by holding that the legality of the underlying deployment order presented a nonjusticiable political question. That claim also lacks merit and does not independently warrant review.

In *Baker* v. *Carr*, 369 U.S. 186 (1962), this Court enumerated six factors, any one of which would render a case nonjusticiable under the political question doctrine:

> [1] [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potential-

> ity of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. At least two of those factors—"an unusual need for unquestioning adherence to a political decision already made" and "the potentiality of embarrassment from multifarious pronouncements by various departments on one question"—would render some, and arguably all, of petitioner's challenges to the deployment order nonjusticiable under the political question doctrine even in an ordinary civil action. *Ibid.* Moreover, as the court of appeals noted, even assuming that some of petitioner's challenges would be justiciable in a civil action, "the military justice context compels a somewhat broader [political question] doctrine in light of the implications of any alternative view." Pet. App. 13a. As Judge Effron explained in his concurring opinion on direct review (and as the court of appeals reiterated), were it the case that a member of the military could disobey a *deployment* order and subsequently challenge the validity of that order before a court-martial, it would effectively transform court-martial proceedings into "a vehicle for altering the traditional relationship between the armed forces and the civilian policy making branches of government." *Id.* at 13a, 84a; see *In re Grimley*, 137 U.S. 147, 153 (1890) (noting that "[n]o question can be left open as to the right to command in the officer, or the duty of obedience in the soldier"). Petitioner cites no authority for the proposition that a member of the military can challenge the validity of a deployment order in such a manner.

In any event, petitioner does not merely contend that the military judge erred by prohibiting him from challenging the underlying *deployment* order under the political question doctrine, but instead contends that, in so

doing, the military judge deprived him of his ability to present a complete defense (and therefore violated his right to due process). See, *e.g.*, Pet. 29, 30. Petitioner, however, was fully able to challenge the validity of the *uniform-modification* order, the disobeyance of which was the subject of the immediate charge against him. The military judge considered petitioner's challenges to that order and ultimately concluded that the uniform-modification order was lawful. See Pet. App. 3a. Particularly in light of the more limited role that the Due Process Clause plays in the military justice system, see, *e.g.*, *Weiss*, 510 U.S. at 176-178, the application of the political question doctrine to prohibit petitioner from challenging the validity of the underlying *deployment* order constituted a reasonable restriction on the scope of petitioner's defense and thus did not offend due process.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

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No. 06-691

IN THE

Supreme Court of the United States

UNITED STATES *EX REL.* MICHAEL G. NEW,

Petitioner,

v.

ROBERT M. GATES, SECRETARY OF DEFENSE, *ET AL.*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Contrary to the Government's argument that this case would be a "poor vehicle" to address the questions presented by Michael New's Petition ("Pet."),[1] just the opposite is true. New's Petition presents to the Court a unique opportunity to resolve existing conflicts and confusion prevailing in the federal courts for over five decades over the proper standard of review to be applied to collateral attacks on courts-martial convictions in a case of critical importance to the administration of military justice.

1. Contrary to the Government's Assertion, This Case Is Appropriate for Review.

According to the Government, the conflict among the circuits over the standard of review governing collateral attacks on courts-martial convictions has matured sufficiently for review by this Court in **habeas** collateral attacks, but that conflict has not yet emerged in **non-habeas** attacks, such as presented by New's petition. Resp. Br., pp. 13-14. However, it is precisely because New was not found to be "in custody" that this case presents a unique opportunity for this Court to clarify the standard of review in both kinds of cases. On the one hand, if the Court were to hold that the **same** standard of review applies in both habeas and non-habeas collateral attacks, it would need to clarify that standard. On the other hand, if the Court were to hold that a **different** standard of review applies in non-habeas collateral attacks, it would still be necessary to articulate that standard and clarify how it differs from the habeas standard, an analysis that would necessarily entail clarifying the Burns v. Wilson "full and fair consideration" test.

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[1] *See* Brief for the Respondents in Opposition ("Resp. Br. "), pp. 13-14.

In either event, the Court should grant certiorari to clarify the standard of review that applies in non-habeas collateral attacks. Contrary to the Government's equivocal assertion, this Court's decision in Schlesinger v. Councilman, 420 U.S. 738 (1975), does not "**seemingly support[]** the proposition that the standard of review in collateral challenges under [28 U.S.C.] Section 1331 should be more deferential" than challenges cognizable under 28 U.S.C. Section 2241. Resp. Br., p. 13 (emphasis added). Nowhere in that case did the Court indicate that the "fundamental defect" test was intended to establish a different, more deferential standard of review in non-habeas collateral attacks. Indeed, in Councilman, this Court observed that both non-habeas cases, and "habeas cases, demonstrate a **uniform** approach to the problem of collateral relief from the consequences of court-martial judgments." *Id.*, 420 U.S. at 748 (emphasis added). Further, as pointed out by New's Petition and the National Institute of Military Justice's *amicus* brief ("NIMJ Br."), the Councilman case did not involve a collateral attack on a court-martial conviction and thus did not even address what the standard of review should be in a non-habeas case. *See* Pet., p. 16. *See also* NIMJ Br., pp. 15-20.

Finally, the Government has contended that the standard of review issue raised in this case should "await further percolation," because there supposedly is no "case (other than this one) that has even discussed, much less rejected, the argument that the standards should be different." *See* Resp. Br., pp. 13-14. This effort to isolate this case into a class of one should be rejected because the court of appeals below, like all of the other courts that have dealt with a non-habeas collateral attack, wrestled with the Burns "full and fair consideration" formula before setting its standard of review. *See* U.S. *ex rel.* New v. Rumsfeld, 448 F.3d 403, 407-08 (D.C. Cir. 2006); Pet., pp. 5a-7a. The major difference between this case and the other non-habeas cases is that no other court has

gone so far in a non-habeas case as to water down the Burns standard, the other courts having applied that standard without discriminating between the two types of collateral attacks. *See, e.g.*, Bowling v. United States, 552 F. Supp. 54, 56-57 (Cl. Ct. 1982). Indeed, prior to this case, the "governing precedent" in the District of Columbia Circuit was Kauffman v. Secretary of the Air Force, 415 F.2d 991, 995, *cert. denied*, 396 U.S. 1013 (1970),[2] which had applied a far more stringent standard of review in a non-habeas collateral attack, fashioned from the Burns v. Wilson standard of "full and fair consideration"[3] developed by this Court in a habeas collateral attack.[4] By its radical and unexplained departure from Kauffman, the court below has brought the conflict and confusion over the standard of review to a culmination point. American servicemembers would not be well-served by another 50 years of "percolation." *See* Pet., pp. 16-18; NIMJ Br., pp. 2-4.

2. Contrary to the Government's Assertion, There Is No "Broad Agreement" Among the Circuits on the Standard of Review.

In an attempt to minimize the conflicting interpretations and applications of the Burns test, the Government claims that the courts of appeal are in "broad agreement on two principles," namely: (1) that "only claims involving fundamental or substantial constitutional errors are cognizable on collateral review"; and (2) that "the decisions of the military courts are entitled to at least some degree of deference." Resp. Br., p. 12.

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[2] *See* U.S. *ex rel.* New v. Rumsfeld, 350 F. Supp. 2d 80, 89 (D.D.C. 2004). Pet., p. 26a.

[3] *See* Kauffman, 415 F.2d at 996-97.

[4] *See* Burns, 346 U.S. at 139.

That argument is factually incorrect, and in any event does not obviate the need for review.

First, there is **no** consensus in the courts of appeal that "**only** claims involving fundamental or substantial errors are cognizable on collateral review." Most recently, the Third Circuit applied the standard of review set forth in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254 (2000), to a habeas petition brought by a military prisoner. Brosius v. Warden, 278 F.3d 239 (3d Cir. 2002). Under that standard, claims that a court-martial conviction was obtained "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," are cognizable, as are claims that a decision was based on an "unreasonable determination of the facts." *Id.*, 278 F.3d at 245. *See* NIMJ Br., pp. 10-11, 13. Additionally, the Fifth and Tenth Circuits have adopted the Calley test, which expressly embraces review of a court-martial conviction on a **nonconstitutional** ground where "**exceptional circumstances have been presented which are so fundamentally defective as to result in a miscarriage of justice**." Calley v. Callaway, 519 F.2d 184, 203 (5th Cir. 1975) (emphasis added). *Accord*, Cothran v. Dalton, 83 F. Supp. 2d 58, 66 (D.D.C. 1999).

Second, the existence of a consensus that "the decisions of the military courts are entitled to at least **some** degree of deference," as the Government has contended, offers no judicial standard at all, as vividly illustrated by this very case. The court of appeals below ruled "that non-habeas review is if anything **more deferential** than habeas review of military judgments," but did not articulate what that standard of deference should be, having "serious doubt whether the judicial mind really is capable of applying the sort of fine gradations of deference that the **varying formulae** may indicate." U.S. *ex*

rel. New v. Rumsfeld, 448 F.3d at 408; Pet., p. 7a. (emphasis added). Ironically, the Government's assertion that there is a consensus on the degree of deference to be accorded military courts rests upon Brosius, a habeas case, and Kauffman, a non-habeas case.[5] But this contradicts the ruling below that the degree of deference differs in the two kinds of cases — a ruling which, by its Brief in Opposition, the Government now seeks to uphold.

In short, the Government has strained at a gnat, hoping that this Court will swallow a camel. On the one hand, it asserts "broad agreement"[6] among the circuits and, on the other, admits that there are "inconsistencies" in the "different formulations of the standard of review for collateral challenges to convictions by courts-martial."[7] This difference, however, arises not because some of those challenges are cognizable under "the habeas statute," and others under the "general federal-question statute," but because Burns has engendered the conflict and confusion in whatever type of case it has been applied. *See* Pet., pp. 11-16; NIMJ Br., pp. 8-11.

3. Contrary to the Government's Argument, New's Claims Are Cognizable in a Collateral Attack on His Court-Martial Conviction.

The Government contends "that under any plausible formulation of the applicable standard, petitioner would not prevail on either of the underlying claims that he continues to advance." Resp. Br., p. 14. However, not only has the

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[5] *See* Resp. Br., p. 12.

[6] *See id.*

[7] *See id.*, p. 13.

Government failed to articulate that "plausible" standard, but it has proposed a disputed standard of review by which it then purports to assess the adequacy of New's collateral attack.

The Government asserts that New's claim that he was denied due process by the military court's ruling — that the lawfulness of the uniform-modification order need not be proved beyond a reasonable doubt — "is not of constitutional dimension," but only a matter of statutory interpretation and, therefore, "not ... cognizable on collateral review." Resp. Br., pp. 15-16. Citing Bowling, 713 F.2d at 1562, and Calley, 519 F.2d at 199, the Government has assumed that any "plausible" standard of review would foreclose any review of a claimed error in statutory interpretation, no matter how egregious that error may have been. But the Calley standard squarely contradicts the Government's position.

As Judge Friedman — the district court judge before whom New's Petition was initially presented — has already pointed out, the Calley court stated:

> "Most habeas corpus cases have provided relief only where it has been established that errors of constitutional dimension have occurred. But the Supreme Court **held** in a recent decision that **nonconstitutional errors of law** can be raised in habeas corpus proceedings where 'the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice,"' and when the alleged error of law 'presented exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'" *Davis v. United States*, 417 U.S. 333, 346 ... (1974), quoting *Hill v. United States*, 368 U.S. 424, 428 ... (1962). Thus, an essential

> prerequisite of any court-martial error we are asked to review is that it present a substantial claim of constitutional dimension *or* that **the error be so fundamental as to have resulted in a gross miscarriage of justice**. *Calley v. Callaway* ... [U.S. *ex rel.* New v. Rumsfeld, 350 F. Supp. 2d 80, 91 (D.D.C. 2004), Pet., pp. 29a-30a. (italics original) (bold added).]

Moreover, Judge Friedman went out of his way to remind the Government that "[a]t oral argument, [the Government] **incorrectly** interpreted" Cothran v. Dalton, 83 F. Supp. 2d 58 (D.D.C. 1999), "as limiting collateral review to fundamental constitutional errors":

> But consistent with *Davis* v. *United States*, 417 U.S. 333 ... (1974), Judge Flannery actually held in Cothran that *any* constitutional or jurisdictional error is subject to review on collateral attack, **while statutory claims are subject to such review only if they are so fundamental as to render the court-martial proceeding unfair....** [U.S. *ex rel.* New v. Rumsfeld, 350 F. Supp. 2d at 91 n.6; Pet., p. 30a (italics original) (bold added).]

Additionally, the AEDPA standard applied in Brosius would permit a collateral attack based upon a claim that a court-martial conviction was obtained "contrary to, or involv[ing] an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." Brosius, 278 F.3d at 245.

Thus, under either the Calley or the Brosius standards, New has clearly alleged a cognizable claim in Count 1 of his complaint. *See* Second Amended Complaint for Declaratory

Judgment, Injunctive Relief and an Order in the Nature of a Writ of Mandamus Amending Petition for Writ of Habeas Corpus ("Compl.") ¶¶ 40-41; Pet., p. 181a.

4. Contrary to the Government's Argument, New's Due Process Claims Are Meritorious and of Substantial Constitutional Dimension.

Although the Government has acknowledged that this Court has ruled that, **"in a criminal case"** the Due Process Clause requires the prosecution to "'pro[ve] beyond a reasonable doubt ... every fact necessary to constitute the crime with which [the defendant] is charged,"[5] the Government has contended that this standard does not apply to a court-martial "in light of the more limited role that the Due Process Clause plays in the military justice system," citing Weiss v. United States, 510 U.S. 163, 176-78 (1994). Resp. Br., p. 16. But Weiss involved a due process claim **challenging** the constitutionality of a clearly established **congressional policy** to which "courts 'must give particular deference to [in light of] Congress['s] ... authority to regulate the land and naval forces.'" *Id.*, 510 U.S. at 177. In contrast, New's due process claims do **not** challenge congressional policy. Rather, those claims **rest on constitutional norms** embodied in statutory provisions governing court-martial practice and procedure, and in statutory provisions limiting the president's authority to deploy American armed forces in the service of the United Nations, all of which were enacted by Congress in pursuance of its authority to "make Rules for the Government and Regulation of the land and naval forces." *See* Pet., pp. 22-29.

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[5] *See* Resp. Br., p. 15 (emphasis added).

With respect to New's claim that he was denied due process of law by the court-martial ruling that "lawfulness" was not an element of the offense charged, the military courts misconstrued an offense **defined by Congress** in 18 U.S.C. Section 892(2), in disregard of the "rule of [statutory] construction ... in Neder v. United States, 527 U.S. 1 (1999)." *See* Compl. ¶ 40, Pet., p. 181a. Further, New has claimed that, by eliminating the order's "lawfulness" as an element of the offense — consigning it as an issue of law for the judge, rather than a mixed question of law and fact for the military jury — the military courts have "evaded" the due process requirement of proof of every element of an offense beyond a reasonable doubt, embraced by Congress in 18 U.S.C. Section 851(c). *See* Compl. ¶¶ 19, 30; Pet., pp. 177a, 179a. As the Navy-Marine Corps Court of Criminal Appeals stated in United States v. Myers, 51 M.J. 570 (N.M.C.C.A. 1999), "the Due Process Clause of the Constitution requires the prosecution to prove each and every element of every offense alleged against an accused by legal and competent evidence beyond a reasonable doubt." *Id.*, 51 M.J. at 578. Yet, in New's case — in violation of this due process principle — the uniform-modification order was justified not by the introduction of any evidence, but solely by the contradictory and unsupported arguments of the prosecutor. *See* Compl. ¶¶ 15, 17, 19, 23; Pet., pp. 175a-178a. As Judge Sullivan of the United States Court of Appeals for the Armed Forces ("CAAF") observed, in so doing, New's court-martial represented a "**radical departure** from our political, legal and military tradition."[9] United States v. New, 55 M.J. 95, 115 (2001) (Sullivan, J., concurring) (emphasis added).

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[9] *See, e.g.*, Judge Sullivan's analysis of the text of 18 U.S.C. § 892(2), treatises, courts-martial manuals, and cases establishing "lawfulness" as an element of the offense alleged in the charge against New. United States v. New, 55 M.J. 95, 120-22 (2001); Pet., pp. 108a-115a.

Although the Government disputes New's claim that he was denied due process by the misuse of this Court's political question doctrine, it ignores the fact that New's challenge to the legality of the Macedonian deployment was primarily based upon explicit statutory grounds, supported by expert testimony that the Macedonian deployment violated the United Nations Participation Act. Yet, the military courts refused to address the merits of this statutory claim, indiscriminately sweeping it aside as a nonjusticiable political question.

The Government's response blithely claims that using "the political question doctrine to prohibit [New] from challenging the validity of the underlying *deployment* order constituted a reasonable restriction on the scope of [New's] defense and thus did not offend due process." Resp. Br., p. 19. In reality, however, the military courts denied New his fundamental right to a fair trial, having deprived him of any meaningful opportunity to contest the legality of the ordered Macedonian deployment,[10] while allowing the prosecution to rely upon the supposed legality of that same deployment to justify what, as CAAF Judge Sullivan observed, would otherwise have been a "patently illegal" order. *See* United States v. New, 55 M.J. at 127.

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[10] *See* Compl. ¶¶ 9, 12, 16, 26, 27, 44; Pet., pp. 172a-176a, 178a-179a, 182a. *See also* Pet., pp. 27-30.

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